Citywide Corporate Transportation, Inc. *and* District 15, I.A.M.A.W. Case 2–CA–30832

October 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On August 11, 1999, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. October 22, 2002

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

Hardly a new phenomenon, employee ownership in its assorted varieties has commanded greater attention in recent times as a realistic alternative to existing management, ownership, and compensation forms. This case raises the question whether certain shareholder employees enjoy the protections of the National Labor Relations Act, presenting yet another example of the difficulty of applying statutory coverage doctrines to changing workplace realities.[1] The outcome of this case is arguably straightforward, under the Board's current law, but the law itself is ripe for reconsideration. Established precedent—although not fully rationalized—would seem to deny the Act's protections to some shareholder-employees who might benefit from the Act's guarantees without undermining its purposes. And as employee ownership increases, more employees may be excluded from statutory coverage, perhaps without compelling reasons.

Bernard Quashie is a driver for the Respondent, a limousine service organized as a New York cooperative corporation. He is also a shareholder-member of the corporation, jointly owning one share. Shareholder-drivers like Quashie hold more than 200 of the corporation's 277 voting shares; some own more than 1 share. As a group (the judge found), these drivers have the power to elect the persons who run the Respondent, to change its working rules, and to amend its constitution. Accordingly, the judge held, the Board's precedents dictate that Quashie is not an employee protected by the Act—and the Respondent thus was free to deny Quashie work opportunities in retaliation for his efforts to organize drivers into a union.[2] The judge thus dismissed the complaint here. My colleagues agree.

That result seems correct, under our decisions,[3] which hold that when employees, as a group, have an "effective voice in the formulation and determination of corporate policy," they are *managerial employees*, excluded from the coverage of the Act, based on the Board's doctrine, as approved by the courts. I have previously questioned whether the Board's approach in this area may hinder employee-ownership arrangements that benefit firms and workers alike. See *Centurion Auto Transport*, supra, 329 NLRB at 398 fn. 16. I write separately today to suggest that the Board should soon (if not here and now) reexa m-

[1] In adopting the judge's dismissal of the complaint, we find it unnecessary to pass on his alternative finding that the Respondent's class A drivers, including alleged discriminatee Quashie, are independent contractors. We also find no need to address the issues raised by our concurring colleague with respect to precedent that she and we agree was correctly applied by the judge in the circumstances of this case.

[1] See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (supervisory status of registered nurses); *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) (representational rights of contingent workers); *Boston Medical Center Corp.*, 330 NLRB 152 (1999) (employee status of medical interns, residents, and fellows); and *AmeriHealth Inc./AmeriHealth HMO*, 329 NLRB 870 (1999) (independent contractor status of physicians).

[2] Given the Board's disposition of the case, it need not address whether Quashie was an independent contractor, a category of workers also excluded from the Act's coverage. Although I also reserve judgment, I am doubtful that a member of a cooperative can properly be described as an independent contractor with respect to the cooperative, at least insofar as he and other members carry out its core business. Cf. *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 32 (1961) (holding that cooperative members are protected employees under Fair Labor Standards Act).

[3] See, e.g., *Centurion Auto Transport*, 329 NLRB 394, 398 (1999) (directing election, after concluding that shareholder-employees did not have effective voice with respect to single employer companies); *Lake Pilots Assn.*, 320 NLRB 168, 178–179 (1995) (applying Sec. 8(a)(2) and finding employer-domination of union, based on role of shareholder employees); *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 132 (1993) (applying Sec. 8(a)(3) and finding that minority-shareholder employees, who lacked effective voice in employer's management and who did not have managerial job functions, were protected by Sec. 7).

ine its approach, which may have evolved inadvertently, without careful consideration of all its current ramifications.

We should consider, for example, whether the Act truly demands that workers like Quashie—who individually lack any effective power to control their working conditions and whose job functions alone cannot fairly be called managerial—be denied any statutory rights at all, whether to engage in concerted activity or to bargain collectively even in their own separate unit. By categorizing certain shareholder-employees as managerial employees—as opposed to treating their situation as sui generis—the Board forecloses options that likely are consistent with the Act and sound policy as well.

Not until 1982, it seems, did the Board explain (albeit in dicta) its approach to bargaining-unit issues involving shareholder-employees in terms of the managerial-employee category. See *Upper Great Lakes Pilots, Inc.*, supra, 311 NLRB at 132 fn. 7 (1993), citing *Florence Volunteer Fire Department*., 265 NLRB 955, 956 (1982). Decades earlier, in a decision never expressly overruled, the Board had held that even shareholder-employees with an effective voice in running the company could constitute their own, appropriate bargaining unit. *Everett Plywood & Door Corp*., 105 NLRB 17 (1953) (finding appropriate unit of employee-owned cooperative's production and maintenance employees, but excluding employees serving on board of directors).[4] This holding is inconsistent with the notion that such employees are managerial (and thus excluded from the Act's protections), although that category was certainly part of the Board's law at the time. See *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 285–288 (1974) (discussing Board's managerial-employee doctrine following passage of Taft-Hartley Act in 1947).

There is a basic distinction, in turn, between excluding shareholder-employees from bargaining units that include other employees—as the Board has long done, based on their differing interests[5]—and denying such employees the right to engage in collective bargaining altogether. There is a distinction, as well, between holding that employees cannot engage in collective bargaining even in their own unit and holding that they have no Section 7 rights at all. Confidential employees, for example, may not bargain collectively, but the Board at least has held that they are entitled to engage in other types of protected activity. See *Hendricks County Rural Electric Membership Corp*., 454 U.S. 170, 184 fn. 19 (1981).

The Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), may well bear on the issue of extending statutory protections to shareholder-employees. In finding certain university faculty members to be managerial employees, despite the fact their authority was exercised only collectively, the Court cited with apparent approval Board cases excluding shareholder-employees from bargaining units that included other employees. 444 U.S. at 685 fn. 21.[6] But with respect to workers like Quashie who as individuals apparently do not have an essential role in the governance of the enterprise—in contrast to the Yeshiva faculty members, as well as the officers and executive board members of the cooperative corporation here—the application of *Yeshiva* is debatable.

In short, there is seemingly legal room for the Board to develop new approaches to issues posed when employees, as a group, do have an effective voice, via ownership, in determining corporate policy. I am not prepared to say, as the judge here was, that "[w]here a group of individuals already has the power to collectively influence the policies of an organization . . . they do not need the Act's protection." It is not clear that Congress has made that determination. The Taft-Hartley amendments, for example, did not squarely address the issue, although Congress presumably was aware that the Board had extended the Act's protections to workers who did own the enterprises that employed them. See *Olympia Shingle Co*., 26 NLRB 1398, 1414 (1940) (finding violation of Sec. 8(a)(3) in discrimination against persons who sought to become employee-stockholders in cooperative), Decision and Order set aside, 36 NLRB 473 (1941).[7] And it should give us pause that workers like Bernard Quashie, despite their supposed collective power as owners, apparently feel that exercising the rights promised by the Act would improve their working conditions.

Even if actual collective bargaining by such workers might raise difficult issues, there are good arguments for permitting them to seek mutual aid and protection under the Act, when their interests diverge from other shareholder-employees, particularly those who directly manage the enterprise, who have a larger ownership stake, or

[4] The *Everett Plywood & Door* Board observed that the "mere fact that an employee also has the rights and privileges of a stockholder is not sufficient to debar him from availing himself, in his capacity as an employee, of the rights of employees to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection." 105 NLRB at 19 (footnote omitted).

[5] See, e.g., *Brookings Plywood Corp*., 98 NLRB 794, 798–799 (1952).

[6] The *Yeshiva* Court cited *Sida of Hawaii, Inc*., 191 NLRB 194, 195 (1971); *Red & White Airway Cab Co.*, 123 NLRB 83, 85 (1959); and *Brookings Plywood*, supra.

[7] The Board's subsequent order does not explain why the original Decision and Order was set aside, but the Board subsequently treated *Olympia Shingle* as valid precedent. See *Everett Plywood*, supra, 105 NLRB at 19 fn. 3.

who otherwise have become entrenched in positions of power. As for collective bargaining in such enterprises, it may seem in tension with the conventional notion that such bargaining presupposes a clear division between owners and workers. But commentators have challenged that view,[8] and their argument that the institution of collective bargaining is sufficiently flexible to coexist with employee control of the enterprise is worth examining.

There is good reason to think that employee ownership is a permanent and increasingly common feature of the American economy.[9] As one commentator observes, "[s]upport for worker ownership as a superior firm structure, at least for certain types of companies, has been growing for years."[10] Among the claimed benefits of worker ownership are improved morale and productivity, as the interests of employees are aligned more closely with those of the firm.[11] It is ironic the Board's early decisions—issued at a time when employee ownership was surely less common than it is today—were more hospitable than later decisions to harmonizing the goals of the Act with employee control of business enterprises. In the future, the Board may do well to look backward.

Dated, Washington, D.C. October 22, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Ian Penny, Esq., for the General Counsel.
Richard Vande Stouwe, Esq., for the Respondent.
William Rudis, Grand Lodge Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in New York, New York, on April 20–22, 1999. The charge was filed by District 15, I.A.M.A.W. (the Union) October 1, 1997,[1] and the complaint was issued October 22, 1998. The complaint alleges that Citywide Corporate Transportation, Inc. (the Respondent) violated Section 8(a)(1) of the Act through surveillance, interrogation, and threats of unspecified reprisals in July and August, and that it violated Section 8(a)(1) and (3) of the Act by denying its employee, Bernard Quashie, employment opportunities since about late August. The Respondent filed an answer to the complaint on November 4, 1998, denying the alleged unfair labor practices and asserting, as affirmative defenses, that the Board lacks jurisdiction over the Respondent because it is owned by the drivers and has no employee drivers, and that Quashie, as a part-owner of the Respondent, is not an employee within the meaning of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a domestic corporation, operates a limousine service company out of its facility in the Bronx, New York, where it annually derives gross revenues in excess of $500,000 and purchases and receives products, goods, and materials valued in excess of $5000 directly from suppliers located outside the State of New York. The Respondent, while admitting these facts, denies that it is an employer engaged in commerce within the meaning of the Act. The Respondent's denial is based upon its affirmative defense that it is owned by the drivers and has no employee drivers. The record reveals that the Respondent employs, in addition to the drivers, approximately 51 administrative personnel, such as dispatchers, telephone operators, messengers, and accounts receivable and accounts payable clerks. These administrative employees do not have any ownership interest in the Company. Accordingly, because the Respondent is an employer and meets the Board's jurisdictional standard for retail enterprises, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent amended its answer at the hearing to admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The facts regarding the alleged unfair labor practices are largely undisputed. The evidence shows that Quashie was approached by a union organizer while working at LaGuardia Airport on July 27 and that he thereafter met with representatives of the Union from whom he received a supply of videotapes and literature expounding the benefits of union representation for limousine drivers. Quashie distributed this material to fellow drivers over the next few days, until he was called before the Respondent's executive board. The Respondent essentially concedes that, at the executive board meeting on August 4, Quashie was questioned about his activities on behalf of the Union and accused of engaging in conduct detrimental to the

[8] See Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans*, 67 Fordham L. Rev. 957, 1005–1011 (1998); Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. Pa. L. Rev. 1, 48-61 (1988); see also Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. Chicago L. Rev. 73, 120–161 (1988).

[9] See, e.g., National Center for Employee Ownership, *A Statistical Profile of Employee Ownership* (April 2002), available at www.nceo.org/library/eo_stat.html. See also Christoper Mackin, *Employee Ownership in America: A Primer for Industrial Relations*, 5 Perspectives on Work No. 2, 5–9 (2001).

[10] Hirsch, supra, 67 Fordham L. Rev. at 959.

[11] See id. at 974–976.

[1] All dates are in 1997 unless otherwise indicated.

Respondent. At the end of that meeting, Quashie was referred to the security committee to determine whether his actions had violated the Respondent's constitution. There is no dispute that the security committee filed charges of such a violation after a meeting the same night at which Quashie was again questioned about his union activities. Respondent concedes that Quashie was tried on these charges by the Respondent's executive board on August 6 and found guilty of violating article V of the constitution. Despite this finding, no formal penalty was ever imposed. The General Counsel alleges, and the Respondent disputes, that the Respondent in fact penalized Quashie by denying him work opportunities after his trial. This is the only real factual dispute with respect to the unfair labor practice allegations.

The primary and threshold issue in this case is whether Quashie was entitled to the Act's protection when he engaged in union organizing activities. As noted above, the Respondent asserts that, as a shareholder of the Respondent with the rights and privileges set forth in the Respondent's governing documents, Quashie was not covered by Section 7 of the Act. The Respondent argues that Quashie, in his capacity as a shareholder, was akin to a managerial employee. The Respondent argues that Quashie was also excluded from the Act's coverage because he was an independent contractor. The General Counsel disputes these contentions, factually and legally. Because the complaint must be dismissed if the Respondent's position is upheld, I shall address this issue first.

Quashie's Status

The Respondent is a black car limousine company offering transportation to corporate clients throughout the New York metropolitan area. The Respondent is a corporation with 300 shares outstanding, of which 277 are held by shareholder-drivers and the remainder, having been taken back by foreclosure, are held by the Respondent. The Respondent's president, Anthony Ciavarella, estimated that 200–220 shares are held by drivers and the rest of the 277 are held by officers of the corporation and executive board members who are also current or former drivers. Each share represents a radio license giving the holder a right to receive calls through the Respondent's computerized radio dispatch system. The current price for a share is $30,000. This price has not changed as long as Ciavarella has been an officer.

An individual who wants to become a driver-member of the Respondent must buy a share. Prior to 1989, share purchases were financed by a credit union, the League of Mutual Taxi Owners (LOMTO). The Respondent took over financing share purchases in 1989 as a way to avoid drivers losing their radio licenses through foreclosure by LOMTO.[2] Drivers repay these loans, whether obtained from LOMTO or the Respondent, through deductions from their earnings as a driver. In 1987, the Respondent distributed a surplus that had accumulated in its account at LOMTO through repayment of these loans to then-shareholders at approximately $10,000 per share. Since the Respondent took over financing, all moneys collected from the sale of shares/licenses is deposited into a fund which is used to finance share purchases by the drivers. The Respondent also distributes any profits from its operations to the driver-shareholders twice a year in the form of dividends. Recent dividends have been about $1000–1500. A driver-shareholder may terminate his relationship with the Respondent by selling his share/license back to the Respondent for the fixed price of $30,000 or by transferring it to a family member. Under the Respondent's constitution, a shareholder may not make a profit on the sale of his share until he has held the share for at least 2 years.

The Respondent is managed by 5 officers and an 11-member executive board. The executive board is comprised of the five officers and six driver-members. Each member of the executive board, except the president, has one vote on matters coming before the board. The president only votes in the event of a tie. All officers and board members are elected by the shareholders. The shareholders also elect the chairmen and members of the unemployment fund committee and the security committee. The security committee enforces the rules and can present charges against driver-shareholders to a judicial committee, whose chairman is also elected by the membership. Under the Respondent's constitution, there are seven other standing committees, including the finance committee, rules committee, and grievance committee, whose members are appointed by the president, and a watchdog committee whose chairman is appointed by the executive board. All officers, board members, and committee members must be shareholders.

The Respondent's president has authority to conduct the day-to-day operations of the Respondent. Ciavarella has been the president since 1989 and an executive board member since 1979. At the time of the hearing, he owned 14 shares, an increase from the 5 or 6 shares he owned at the time of the alleged unfair labor practices. He has not driven for the Respondent since 1984. Jean Mondesir, the Respondent's vice president since 1990, oversees the Respondent's dispatch operations and briefs new drivers. He stopped driving for the Respondent sometime in 1997. At the time of the hearing, Mondesir owned 20 shares, an increase from the 3–5 shares he owned at the time of the alleged unfair labor practices. The salary and other compensation paid to the officers and other elected positions are set forth in the constitution and can be changed by a vote of the member-shareholders.

Prior to September 1997, each member had one vote in elections and at general membership meetings, regardless of the number of shares owned. The constitution was amended in September 1997, to comply with New York corporation laws, to provide for one vote per share.[3] General membership meetings are held five times a year. The constitution also provides for the calling of special membership meetings at other times. Under the constitution, a two-thirds majority is required to amend the constitution, or to expand the fleet. Ordinary business questions and/or motions, and elections are determined by

[2] As explained by Ciavarella, a driver experiencing difficulties repaying his loan may now get an extension by vote of the executive board. In the past, LOMTO, being an independent entity, would foreclose on drivers who failed to make payments on their loans.

[3] This change may explain the increase in the number of shares owned by the Respondent's president and vice president, and perhaps other officers, since 1997.

simple majority vote. The constitution sets forth a procedure for impeachment of elected officers, board members, and committee persons leading to a majority vote of the shareholders at a special meeting. There is also a procedure in the constitution for members to rescind any working rules. The latter may be accomplished by submission of a petition signed by five shareholder-members, followed by a majority vote of the membership.

The drivers relationship with the Respondent is governed by its constitution, as well as by working rules and a code of conduct. The working rules are formulated by the rules committee or the communications committee and approved by the executive board or the general membership. It appears from the record that most of the rules have been approved by the executive board and put into effect without a membership vote. However, as noted above, it only takes five members to initiate the process to rescind a working rule. In addition, the testimony of the General Counsel's witnesses at the hearing establishes that two of the most significant rules governing the drivers' work, i.e., the morning rule and the party rule, were approved by the members.

The Respondent owns no cars itself. Instead, it provides transportation to its clients through vehicles owned by the driver-shareholders, one per share or radio license. Drivers who own more than one share may lease or hire drivers to work under their share. These drivers are referred to in the constitution as "class B drivers" to distinguish them from the "class A" drivers who own shares in the Respondent. The class B drivers have none of the rights or privileges set forth in the constitution for shareholder-drivers, but they are subject to the working rules and code of conduct. Moreover, although hired by the driver who owns the share he is working under, class B drivers must be approved by various committees and the general membership of the Respondent. There is no evidence in the record regarding the number of class B drivers working for the Respondent, nor is there any evidence regarding the terms and conditions of employment of such drivers.

Drivers working for the Respondent are required to drive late-model American made luxury sedans, such as a Lincoln Town Car. The driver chooses the type of vehicle and finances it himself. Drivers are also responsible for insurance and maintenance of the vehicles. The driver's car is subject to approval by the executive board or a committee. In addition, a clean car committee conducts regular inspections to ensure that the driver's vehicle is up to the standards of the Respondent's customers. In addition to maintaining a clean car, the drivers personal appearance is governed by a dress code specifying the type of clothing that can be worn. Included is a company tie that must be purchased by the drivers from the Respondent. The drivers are also required to display a magnetic sign with the Respondent's name and the driver's car number on and in the vehicle. Each vehicle operated for the Respondent is equipped with the dashboard computer, installed by the Respondent, through which the majority of calls are dispatched.

Although drivers can use their vehicle for personal use, it is unclear from the record the extent to which drivers can use the vehicle for other business. Quashie used his vehicle to drive for another limousine company, while still working for the Respondent, for a short time in 1998, after the alleged unfair labor practice. The Respondent may have been unaware of this at the time. Because of a New York City ordinance, the Respondent's drivers are prohibited from picking up street fares in Manhattan. In addition, language in the driver's application and the Respondent's constitution suggests that drivers are prohibited from soliciting private jobs from the Respondent's customers.

With the exception of the morning and party rules, the Respondent does not tell the drivers when to work. Drivers choose the days of the week and the hours of the day that they want to work. The morning rule, adopted by the membership, requires a driver to be available to take calls between the hours of 5 and 9 a.m. approximately once every 10 days. The rule was adopted to ensure that sufficient cars would be available to take the Respondent's corporate clients to work in the morning. The party rule, also adopted by the members, requires drivers to accept a certain number of party calls during the holiday season, again in order to ensure coverage for parties during a busy season. Drivers who violate these rules are suspended from using the computer dispatch system for a specified period but, as with any other suspension, can buy back the suspension and be reinstated automatically. The cost of the buyback, also specified in the rules, is then deducted from the drivers earnings. The penalty thus becomes a fine.

In addition to determining when they will work, the drivers determine where they will work by choosing which zone to work in. The Respondent has divided the New York metropolitan area into zones, such as Midtown, the Battery, Brooklyn Heights, or one of the airports. The number of drivers that can book into a zone is only limited with respect to the airport zones. Once a driver books into a zone, he goes on a list in the order in which he booked into the zone. Calls are then automatically dispatched to the drivers booked into the zone by going down the list. As drivers receive and accept calls, they go off the list and the next driver moves up. The computer will bypass a driver if it has been programmed to do so, either because he was taken off an account at the request of the customer, or because he has specified that he will not take the type of call being dispatched, e.g., a package or a smoker, or because his car is not equipped with a phone or other amenity requested by the client. When the driver delivers the client to his destination, he may book into the zone where he ended his trip or any other zone nearby. In addition to the automatic dispatch system, a driver can obtain work by accepting reservations, i.e., customer calls for rides the next day, without booking into a particular zone. Drivers learn of available reservations through their dashboard computer by receipt of fleet messages from the dispatcher. A driver who wants to take a reservation will push a button on their computer to accept it. The first driver to do so gets the booking. The computer also informs drivers of calls waiting in zones where there are no cars. The dispatcher will sometimes offer incentives, called "prefs" to encourage drivers to accept these pending calls. An example of a pref would be that a driver accepting such a call could go to the top of the list in a desirable zone after he completes the call. Drivers can also obtain work without logging onto the computer by going to one of the "light lines." These are located at the offices of the Respondent's bigger clients, such as

Morgan Stanley or Time-Life. Cars line up and an onsite dispatcher for the Respondent directs the client's employees who are leaving the building to the first car in line. Some drivers who are booked into the midtown zone will wait for calls at the light line, accepting whichever comes first, a computer-dispatched call or a light line fare.

The Respondent does not handle cash fares or pickups on the street. A client who wants a ride from the Respondent must open an account through one of the Respondent's sales people. Once an account is open, a client calls the Respondent when a ride is needed, either immediately or for a future time. A telephone operator enters the customer's information into a computer and the computer dispatches the call, as described above. The client pays for the ride through a voucher collected by the driver and submitted to the Respondent for processing. The Respondent's billing department uses these vouchers to send weekly invoices and monthly statements to the client. The vouchers are also used to prepare the drivers pay statements. The Respondent has a rate book that specifies the rate for each call and a driver may not change these rates. The driver is paid the fare for the ride, as specified on the voucher, less a $.50 fee charged by the Respondent for processing each voucher and the "discount", which is the Respondent's percentage of the fare. The amount of the discount depends on how quickly a driver wants to be paid. If the driver chooses to be paid within a week, the Respondent deducts 20 percent of the voucher. If the driver is willing to wait 2–3 weeks to be paid, the percentage kept by the Respondent is 15 percent.[4] In addition, drivers are reimbursed for tolls and customer use of cellular phones, if the driver has one in his car. These phones are owned by the drivers who maintain there own accounts with the cellular service provider. The reimbursement rate for the phone is a flat rate, i.e., $1.50 per minute, without regard to the actual cost of the call to the driver. Other than the processing fee and discount, the Respondent withholds from a driver's earnings any buybacks he's authorized, membership dues, New York State radio use tax, and any amounts required to repay loans for the purchase of a share/license or any loans from the Bronx Club. The latter is a fund set up to assist drivers with vehicle repairs in the event of traffic accidents not covered by insurance. The Respondent does not withhold income tax, social security tax, or Federal unemployment insurance tax. The Respondent does not provide health insurance or other typical employee benefits to its driver-shareholders. At the end of the year, drivers are issued a Form 1099, "Miscellaneous Income" showing their gross earnings for tax purposes. The drivers are responsible for paying the taxes on this income.

Quashie became a driver for the Respondent in 1986 by completing an "application" in which he agreed, inter alia, not to make steady riders of the Respondent's customers, not to book any of the Respondent's customers, to abide by the Respondent's rules, regulations and constitution and to place advertising material in his car to help the Respondent. The Respondent agreed to give Quashie a 30-day trial period during which time he could withdraw his application and obtain a refund of a portion of his initiation fee. Quashie testified that the initiation fee was $5000, which was a downpayment on the $25,000 purchase price of a share. He financed the remainder of the purchase through LOMTO with loan payments deducted from his pay. The application provides for a 6-month "probationary period" during which a new member could be expelled without a trial or hearing by a simple majority vote of the executive board. At the end of the probationary period, the new member was required to appear before the executive board for final approval and could be expelled or have his probationary period extended. According to Quashie, he received training when he started by riding with an existing driver for five days and by attending briefings by a member of the briefing committee. This briefing involved testing Quashie on his knowledge of the city and instruction on completing the Respondent's vouchers.

Prior to 1992, Quashie and his wife each owned a share in the Respondent. In 1992, Quashie sold his share back to the Respondent for $30,000 and became a partner with his wife on her share. He transferred his car number (#97) to his wife's share and continued to drive as before. The record does not indicate whether his wife had been a driver, or had leased her share to a class B driver. Although Quashie has never held an elective position in the Respondent, he has served as a co-chairman of the communications committee, which formulates most of the rules, and a member of the screening committee, which screens applicants and conducts briefings of new members. The record does not disclose when he served on these committees. The record also does not indicate how Quashie and his wife vote their share. Because Quashie's wife returned to their native Tobago in early 1996, it is reasonable to infer that he has exercised the voting rights as a full shareholder.[5]

The Board has long held that the fact "[t]hat an employee may also have the rights and privileges of a stockholder [is] not, of itself, sufficient to debar him from availing himself, in his capacity as employee, of the rights and privileges of an employee to engage in" organizational activities. *Olympia Shingle Co.*, 26 NLRB 1399 (1940). Accord: *Everett Plywood & Door Corp.*, 105 NLRB 17 (1953). At the same time, the Board has historically excluded from bargaining units employee-shareholders where the evidence shows that the employees as a group have an effective voice in the formulation and determination of corporate policy. *Brookings Plywood Corp.*, 98 NLRB 794 (1952). Accord: *Red & White Airway Cab Co.*, 123 NLRB 83 (1959). See also *Science Applications Corp.*, 309 NLRB 373 (1992), and cases cited therein. Although the Board, in the latter cases, does not specifically find that the excluded shareholder-employees are not statutory employees, the effect of excluding them from representation is to deny them the right under Section 7 of the Act to "bargain collectively through representatives of their own choosing."

[4] It appears from the pay statements in evidence that the discount is a percentage of the gross amount on the voucher, after any reimbursements to the driver for tolls or telephone usage are subtracted from the gross.

[5] In a different context, the Board often treats ownership by close family members as personal ownership. See, e.g., *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), and cases cited therein.

In *Upper Great Lakes Pilots*,[6] an unfair labor practice case, the Board agreed with the administrative law judge's conclusion that pilots who owned shares in the Association were employees covered by the Act, but disagreed with his rationale. The judge had relied on the fact that no individual pilot held an amount of stock sufficient to divest him of employee status. According to the Board, the fact that no single pilot owned enough stock to determine corporate policy did not end the inquiry. Because the pilots, as a group, owned all the voting stock, as a group they could effectively determine corporate policy. However, in that case, the evidence showed that the respondent's directors and officers together owned a majority of the voting stock. Thus, the rest of the pilots, even acting in concert, could not outvote the officers and directors. On the basis of their stock ownership, the minority shareholders lacked an effective voice in formulating and determining corporate policy. Similarly, in *Airport Distributors*,[7] the administrative law judge rejected the respondent's contention that an alleged discriminatee who owned 10 percent of the respondent's stock and had served on its board of directors was not an employee within the meaning of the Act. The record in that case did not contain any evidence that he had participated in the formulation of any policies involving management or employee relations. There was also no evidence in the record that any other employees held stock in the respondent. The Board adopted the judge's decision without comment on this issue.[8]

The evidence in the instant case establishes that the Respondent's shareholder-drivers, like Quashie, collectively have an effective voice in the formulation and determination of corporate policy. They own at least 200 of the 277 voting shares, a sufficient majority to elect or impeach officers, board members, and elected committee persons, to rescind working rules and even to amend or change the constitution. Although Quashie, by himself, could not determine policy, the Board has indicated that is not the proper inquiry. *Upper Great Lakes Pilots,* supra. The officers and board members here controlled only a minority of the shares and were thus subject to the whims of the majority. The Board has recognized this conflict in excluding shareholders from bargaining units. If the Respondent's class A drivers, like Quashie, were represented by a union, the Respondent's "officers and directors would, in effect, be placed in a position of bargaining with stockholder drivers who held the power to oust them from their positions, a situation hardly conducive to arm's length bargaining." *Sida of Hawaii, Inc.,* 191 NLRB 194 (1971).

The General Counsel argues that the unit determination cases in which shareholders have been excluded from bargaining units are inapposite. The Board's citation of such cases in unfair labor practice cases like *Upper Great Lakes Pilots,* supra, shows the opposite is true. The rationale for exclusion of shareholder-employees who, as a group, effectively formulate and determine corporate policy is equally applicable to a determination whether their organizational activities should be covered by the mantle of the Act's protection. The congressional intent behind the Act, and Section 7 in particular, was to equalize the bargaining power of employees and employers in order to further collective bargaining. Where a group of individuals already has the power to collectively influence the policies of an organization like the Respondent, they do not need the Act's protection. Quashie's single vote as a shareholder-member of the Respondent is no different than his single vote in a bargaining unit represented by a 9(a) collective-bargaining representative. In both cases, it's the wishes of the majority that governs.

Based on the above, I find that the Respondent's class A drivers, such as Quashie, are not employees within the meaning of the Act because they can, as a group, effectively formulate and determine corporate policy, including labor relations policy. In reaching this conclusion, I have also considered the cases cited by the parties involving independent contractors. To the extent that such cases are applicable to situations where the alleged independent contractor is an owner of the principal, the evidence here shows that the drivers possess attributes of employees and independent contractors. See, e.g., *Roadway Package System,,* 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.,* 326 NLRB 884 (1998). As noted above, the drivers determine their own hours and have some control over their earnings by choosing when and where to work. They also own their own vehicles and may be able to use them, as Quashie did, to work for another company. At the same time, the Respondent's constitution, code of conduct, and working rules appear to govern many aspects of the drivers' performance of their work. Many of these rules, however, are dictated by Government regulation or motivated by concern for customer service, diminishing the impact of such control on a finding of employee status. See *C.C. Eastern v. NLRB,* 60 F.3d 855, 859 (D.C. Cir. 1995). In any event, the critical factor here is that any "right of control" over the drivers performance of their work is exercised by the drivers themselves, either by voting at general membership meetings, or by electing officers and others who determine the rules. In essence, the drivers are working for themselves, not for an employer with conflicting interests.[9]

Having found that Quashie was not an employee within the meaning of the Act at the time he engaged in union organizational activities, it follows that the Respondent's conduct toward him was not an unfair labor practice.[10] Accordingly, I shall recommend that the complaint be dismissed in its entirety.

[6] 311 NLRB 131 (1993).

[7] 280 NLRB 1144, 1150 (1986).

[8] It is not clear from the decision whether the respondent in that case even filed exceptions to this finding by the administrative law judge. The judge noted in his decision that the respondent only raised this as a defense during the hearing and did not argue it in his brief. Thus, the Board may not have even considered the issue in that case.

[9] The facts in *Elite Limousine Plus, Inc.,* 324 NLRB 992 (1997), heavily relied on by the General Counsel, are similar to those here with one important exception. The drivers who worked for Elite had no ownership interest in the employer and thus, no effective voice in the policies, rules, and regulations controlling their work.

[10] The record establishes that Amidor Almonord, another shareholder-driver who acted as Quashie's representative at the security committee meeting and executive board trial, was interrogated regarding his union support and sympathies. Almonord, like Quashie, is not an employee covered by Sec. 7 of the Act. Thus, the Respondent's interrogation of him was not an unfair labor practice.

CONCLUSIONS OF LAW

1. The Respondent's class A driver-shareholders, including Bernard Quashie, are not employees covered by Section 7 of the Act because they effectively formulate and determine corporate policy.

2. The Respondent has not violated Section 8(a)(1) or (3) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated August 11, 1999

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.